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ANALYSIS FOR STATE OF DELAWARE

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Statute:

DEL. CODE ANN. tit. 2, part II, ch. 20, §§ 2001 to 2012

Summary:

Authorizes solicited and unsolicited proposals for PPP projects, including highways and bridges.

Key Elements of Delaware's PPP Enabling Legislation

Last Updated: September 2005

No.	Issue:	Short Answer:	Sample Provision:
1.	Does the relevant law allow solicited and unsolicited proposals for PPP projects?	Yes.	See §2003(c)(1) and (2).
2.	Does the relevant law permit local/state/federal funds to be combined with private sector funds on a PPP project?	Yes.	See §2003(g), which contains good model language.
3.	Who has rate-setting authority to impose user fees and under what circumstances may they be changed or otherwise reviewed?	Private entity by contract.	§2006(a) contains a model provision: Each agreement may authorize the contracting party to impose tolls or user fees for use of the transportation system constructed and/or leased by it to allow a reasonable rate of return on investment. The agreement may authorize the contracting party to collect tolls or user fees through both conventional methods and non-conventional methods including, but not limited to, automatic vehicle identification systems, electronic toll collection systems and, to the extent permitted by law, video-based toll collection enforcement. The agreement may authorize the collection of tolls and user fees by a 3rd party. See also §2010.
4.	Does the relevant law permit TIFIA loans to be used on PPP projects?	Yes.	See §2003(g)(2), which contains good model language.
5.	Is the number of PPP projects limited to only a few "pilot" or "demonstration" projects?	No.	
6.	Are there restrictions concerning the geographic location of PPP projects?	No.	

7.	Are there restrictions concerning the particular mode of transportation eligible to be developed as a PPP project (e. g., truck, passenger auto, freight rail, passenger rail)?	No.	See §2002(g) and its broad definition of "Transportation System," which means any capital-related improvement and addition to the State's transportation infrastructure, including but not limited to highways, roads, bridges, vehicles and equipment, ports and marine-related facilities, park-and-ride lots, rail and other transit systems, facilities, stations and equipment, rest areas, tunnels, airports, transportation management systems, control/communications/information systems and other transportation-related investments, or any combination thereof.
8.	Is there a legal requirement to remove tolls after the repayment of project debt?	No.	§2006(g) explicitly permits DelDOT to continue to charge tolls or user fees.
9.	Does the relevant law permit the conversion of existing or partially constructed highways into toll roads?	No express provision.	
10.	Is there a restriction that prevents the revenues from PPP projects from being diverted to the state's general fund or for other unrelated uses?	Yes.	§2006(e) permits DelDOT in the PPP agreement to require that any "excess revenues" resulting from the project be paid into the state transportation trust fund.
11.	Is prior legislative approval required when an individual PPP proposal is received?	Yes.	See §2003(e)(3), which requires the Secretary of Transportation to notify the Joint Bond Bill Committee of the Delaware General Assembly when a project has been selected by a project committee. The co-chairs of this committee then meet and either approve or reject the project.
12.	Are there any similar requirements that subject the PPP proposal or the negotiated PPP agreement to a local veto?	Yes.	Note that §2003(e)(2) requires each selected project to be approved within 45 days of its selection by the affected metropolitan planning organization and the Council on Transportation. This approval, however, is limited and is largely based upon the project's compatibility with the state and relevant regional transportation plans.
13.	Does the relevant law permit all kinds of procurements for PPP project delivery? These might include, for example, calls for projects, competitive RFQ and RFPs, qualifications review followed by an evaluation of proposer concepts, use of design build, procurements based on financial terms such as return on equity rather than on price, long-term asset leases for some period of up to 60 years or longer from the time operations commence?	Yes.	§2003(c)(3) states that, notwithstanding anything to the contrary, all proposals made pursuant to Delaware's PPP law may provide for the design-build mode of infrastructure development.

14.	Are there explicit exemptions/supplemental procurement authority from the application of the state's general procurement laws?	Yes.	See §2003(f).
15.	Does the relevant law authorize the public sector to grant long-term leases/franchises for the construction, operation and maintenance of toll facilities?	Yes.	See §§2003(a) and 2004. Projects may be leased to private parties for up to 50 years starting from the date of their completion.
16.	Does the public sector have the authority to issue toll revenue bonds or notes?	No express provision.	
17.	Does the public sector have the authority to form nonprofits and let them issue debt on behalf of a public agency?	No express provision.	
18.	Does the relevant public agency have the authority to hire its own technical and legal consultants?	No express provision.	
19.	Does the relevant law permit the public sector to make payments to unsuccessful bidders for work product contained in their proposals?	Yes.	
20.	Can the agency charge application fees to offset its proposal review costs?	Yes.	§2003(d) permits DeIDOT to assess a non-refundable proposal review fee for each proposal not to exceed \$50,000.
21.	Does the relevant law allow adequate time for the preparation, submission and evaluation of competitive proposals? Note that the agency should have the authority to establish these deadlines on a case-by-case basis depending on the complexity and scope of the initial proposal or other factors that might promote competition (e.g., more review time during holiday periods).	No.	Upon acceptance of an unsolicited proposal, §2003(c)(2) requires the Secretary of Transportation to publicly release a detailed description of the unsolicited proposal and provide 60 days within which other interested parties may submit proposals relating to the same subject.
22.	Is the public sector required to maintain comparable non-toll routes when it establishes new toll roads?	No.	
23.	Are there any non-compete clause prohibitions?	No.	See §2005, which explicitly permits DeIDOT to include "protection from competition" provisions in a PPP agreement. §2009(b) even allows DeIDOT to provide a "traffic guarantee" to the private operator provided that it will not "unreasonably prohibit the development of essential public transportations systems and facilities."
24.	Is the authority to enter into PPPs restricted to the state DOT or state turnpike authority or may regional or local entities also do so?	Appears to be limited to DeIDOT.	

25.	Does the relevant law specify evaluation criteria for PPP proposals received under a given procurement approach?	Yes.	According to §2003(e)(1), each proposal must be weighed on its own merits and ranked according to selection criteria stipulated in the request for proposals. Once a proposal is selected for a particular project, the parties may begin negotiating the PPP agreement.
26.	Does the relevant law specify the structure and participants for the review process involving PPP proposals?	Yes.	A project committee selects projects according to §2003(e)(1). This committee is chaired by the Secretary of Transportation and also includes the Director of Financial Management and Budget, the Chief Engineer of DelDOT and up to four other persons who are appointed by the Secretary of Transportation.
27.	Does the relevant law protect the confidentiality of PPP proposals and any related negotiations in the period prior to execution of the PPP agreement?	Yes.	§2003(c)(3) states that proprietary information contained in proposals not selected for projects and records of negotiations in progress are exempt from public disclosure.
28.	Does the relevant law provide for the ability of the public sector to outsource long-term operations and maintenance and other asset management duties to the private sector?	Yes.	See §§2001(c) and 2003(a) discussion of authorized projects.

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